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December 21, 1998

Ms. Magalie Roman Salas
Secretary, Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Salas:

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Enclosed for filing are an original and eight (8) copies of the reply comments of the U.S. Copyright Office in Docket No. 98-201, RM No. 9335 and RM No. 9345, in the matter of "Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act."

If there are any questions, please contact me at (202) 707-8391.

Washington
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Very truly yours,

William J. Roberts, Jr.
Senior Attorney

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act	**Docket No. 98-201** **RM No. 9335** **RM No. 9345**
Part 73 Definition and Measurement of Signals of Grade B Intensity	

REPLY COMMENTS OF THE U.S. COPYRIGHT OFFICE

The U.S. Copyright Office hereby submits these reply comments in the above-captioned proceeding regarding interpretation of the Grade B standard under section 119 of the Copyright Act. The Office commends the Commission in bringing its considerable expertise to bear on the difficult issue of subscriber eligibility for satellite-delivered network television service. While we recognize that Commission action in this area is likely to be limited, we are hopeful that our discussion and suggestions will assist the Commission in bringing some clarity to the eligibility issue and reduce the currently high level of consumer confusion.

I. Scope of These Reply Comments

The Commission's NPRM raises a number of issues regarding interpretation and operation of the section 119(d)(10)(A) Grade B standard as it relates to the "unserved household" restriction of the satellite compulsory license and the eligibility of satellite subscribers to receive network signals. Many of these issues involve technical and policy matters that are beyond the expertise and competence of the Copyright Office. Although we have not had occasion to consider the "unserved household" restriction until recently,[1] the Office's authority to act in this area is fairly limited. Unlike the Commission, we do not possess an express "public interest" grant of authority that would allow

[1] The Office has recently addressed the "unserved household" definition of section 119(d)(10). At the request of Senator Hatch, the Office reviewed section 119, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Report of the Register of Copyrights, 1997)(hereinafter referred to as the "1997 Report"), questioning the efficacy of the restriction in the copyright laws and criticizing the construction and operation of the definition. The Office also opened a rulemaking proceeding, 63 FR 3685 (January 26, 1998), to consider whether the definition is broad enough to permit local-into-local retransmissions of network signals.

us to regulate the satellite and broadcast industries. Likewise, we cannot regulate to promote competition in either the copyright or the telecommunications marketplace. Consequently, we take no position on those matters raised in the NPRM that implicate such considerations and policy objectives.

We do, however, take an interest in the interpretation of the meaning of section 119(d)(10)(A) as it relates to the operation of the satellite license. Since the license's inception in 1988, the question of what constitutes a sufficient signal under section 119(d)(10)(A) to permit receipt of network stations has generated a virtually unprecedented number of public inquiries and more congressional requests for information from the Copyright Office than any other matter in the history of the Copyright Act. We understand that the Commission has likewise received voluminous inquiries. We believe that the Commission's efforts today represent an opportunity to reduce public confusion as to eligibility for satellite network service, and to promote the efficient operation of the satellite license.

These reply comments are limited to three matters concerning interpretation of section 119(d)(10)(A). First, we endorse the Commission's conclusion that Congress did not freeze the 47 C.F.R 73.683 description of Grade B when it enacted the Satellite Home Viewer Act, and that the Commission does have authority to amend its rules to better serve the objectives of the section 119(d)(10)(A) definition. Second, we encourage the Commission to announce technical standards for a household test that accurately measures network broadcast signal intensity at individual households. Third, we encourage the Commission to define a "conventional outdoor rooftop receiving antenna" in relation to the building structure wherein the household is located, rather than adopt a single configuration for all structures. Finally, as a matter of public policy, we reiterate our support for local-into-local retransmissions by satellite carriers of network signals.

II. The Commission's Authority to Proceed

The Commission raises the threshold inquiry as to whether it has authority to interpret, and possibly change, the section 119(d)(10)(A) Grade B standard for determining an "unserved household." Many commenters in this proceeding have answered that inquiry in the negative,

supporting their conclusion with a discussion and analysis of the legislative history. As an active participant in the legislative process that produced the Satellite Home Viewer Act, we believe it appropriate to offer our view of the history. We do this not because the legislative history demands a particular result (it does not), but because we believe that such history lends support to a determination that the Commission does have authority to define what Grade B means in the context of section 119.

In preparation for the 1997 Report, the Copyright Office undertook a thorough review of the legislative history of the Satellite Home Viewer Act of 1988. Review of the House Judiciary and Energy and Commerce Committee reports reveals little relating to what constitutes a signal of Grade B intensity at a conventional rooftop antenna. Both reports parrot the current language of the section 119(d)(10)(A) definition of an "unserved household" with one exception. In the parenthetical that provides that a signal of Grade B intensity is one "defined by the Federal Communications Commission," both reports add that such definition is "currently in 47 C.F.R. section 73.683(a)." The critical word is "currently." Was Congress stating that 47 C.F.R. 73.683(a) was the one and only way of defining Grade B, in essence freezing the section for copyright purposes as of the date of enactment of the Satellite Home Viewer Act? Under this interpretation, the use of the word "currently" would be nothing more than an acknowledgement that at some future date the Commission might change the section number of 73.683(a), but that the content would remain the same. Or was Congress acknowledging that at some point in time the Commission might change the content of section 73.683(a) and redefine the meaning of Grade B?

The Copyright Office agrees with the Commission's tentative conclusion that Congress did not intend to freeze the definition of Grade B. As the Commission correctly points out, when Congress has chosen to freeze FCC regulations for purposes of copyright compulsory licensing, it has expressly done so. See 17 U.S.C. 111(f)(defining a local signal according to FCC rules in effect on

April 15, 1976).[2] The drafters of the section 119 license were intimately familiar with the practice of freezing FCC rules. Rep. Robert Kastenmeier, chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice and principal sponsor of the 1988 Act, also chaired the Subcommittee during adoption of the cable compulsory license and sponsored that legislation. It is unlikely that legislative silence on use of the Grade B standard would sufficiently imply an intention to freeze a Commission regulation, when an affirmative statement of such intention was included in the statute establishing the cable license.[3]

The operation of the Grade B provision also belies an intention to freeze Commission regulations. The section 119(d)(10)(A) definition attempts to define the strength of an over-the-air television broadcast signal as it is received by a "conventional outdoor rooftop receiving antenna." Congress did not, however, specify particular field strength levels reaching an antenna. Rather, it incorporated the Grade B standard "as defined by the Federal Communications Commission." As the Commission points out in the NPRM, the Grade B signal levels specified in section 73.683 of its rules are not household-specific levels, but rather are levels representing a statistical average of measurements producing a television picture that is 90% acceptable in 50% of the locations measured.[4] Read literally, this would suggest that a household was not eligible for satellite network service under section 119(d)(10)(A) if it could receive a 90% acceptable picture 50% of the time. Such a reading, however, is contrary to the Copyright Office's experience and understanding of the

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[2] Congress amended section 111(f) in the Satellite Home Viewer Act of 1994 to expand the definition of a local signal to include a station's television market as defined by the Commission on September 18, 1993, once again freezing a Commission regulation.

[3] In initial drafts of the 1988 Act, the satellite compulsory license only applied to superstations, and did not include network signals. See H.R. 2848 (introduced June 30, 1987). However, satellite carriers, concerned with the viability of a retransmission business that did not include network stations, urged Chairman Kastenmeier to include them in the legislation. Network broadcasters, concerned with a lack of network nonduplication protection against satellite retransmissions, objected. Measures were undertaken in both the Judiciary and Energy and Commerce Committees to resolve the dispute. Chairman Kastenmeier appointed Rep. Boucher, a member of both the Judiciary and Energy and Commerce Committees, to negotiate a deal between broadcasters and satellite carriers. The result was the "unserved household" definition which currently appears in section 119(d)(10).

[4] These locations are not at specific households, but are generated by series of "100 foot mobile runs," which entail a truck with a 30 foot antenna pointed directly at the broadcast transmitter taking continuous readings while driving 100 feet down a public road.

operation of the "unserved household" restriction. We find nothing in the hearings, debates, or drafting sessions suggesting that this was the standard that the members were adopting. Rather, it was our experience that the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice was defining an "unserved household" as one that received a signal at the household (not street) antenna location that was so weak that, assuming receiving equipment of decent quality and maintenance, the household would not receive an acceptable picture most, if not all, of the time. We believe that the Commission has authority to determine under what circumstances this result occurs.

In sum, we support the Commission's determination that it has authority to define what constitutes a signal of Grade B intensity under section 119(d)(10)(A). We take no position whether the Commission can or should develop a Grade B standard solely for purposes of section 119(d)(10)(A), or whether it must use the same standard for all of its rules and regulations.

III. Signal Measurement

The Commission raises two inquiries with respect to signal measurement: (1) whether it would be useful to develop a predictive model, such as the Longley-Rice propagation model, to establish zones of presumed eligibility for satellite network service; and (2) whether it would be useful to define the technical standards for testing signal strength at individual households. While the Office acknowledges that a predictive model could be generally useful in identifying zones where there is a reasonable expectation that all the households are either served or unserved, we express no opinion as to whether the Commission should fashion such a model. We take this position because, like the Commission, we realize that determining signal strength at individual households is the only method provided for in section 119 for determining subscriber eligibility for satellite-delivered network signals. We do, however, strongly urge the Commission to adopt standards for measuring signal intensity at individual households.

In the experience of the Copyright Office, measurement of signal intensity at individual households was not much of an issue from 1988 to 1994. When Congress reauthorized the Satellite Home Viewer Act in 1994, the statute was amended to create a transitory testing regime designed to

eliminate households that were receiving satellite network service in violation of the "unserved household" restriction. Codified at section 119(a)(8), this two-year provision allowed network broadcasters to issue written challenges to subscribers receiving satellite service of that same network. If the challenge was issued against a subscriber who resided outside the Grade B contour of the challenging broadcaster, then the broadcaster was responsible for testing the signal at the subscriber's household for satellite eligibility. See §119(a)(8)(D). If the subscriber was inside the Grade B contour, the satellite carrier had two options: turn off service, or conduct a test. See §119(a)(8)(A). Ultimate responsibility for paying for the test was determined by the outcome -- the so-called "loser pays" provision. See §119(a)(8)(E).

As the transitional signal intensity measurement amendments were being drafted, representatives of both the satellite and network broadcast industries assured the House and Senate copyright subcommittees that, after passage of the legislation, they would negotiate privately the terms and conditions for testing an individual household. They never did. Written challenges to service began to be issued by the thousands beginning in 1995 and, for the most part, challenged subscribers' service was terminated without any testing whatsoever. Many subscribers contacted the Copyright Office (and the Commission) wondering how their household could be tested. Some of these subscribers even stated that they were willing to absorb personally the costs of a test so they could prove that they were eligible for satellite network service. We could not assist them, because there are no established standards for measurement that satisfy the satellite and broadcaster companies involved.[5]

The ways and means of definitively determining whether an individual household receives a signal of Grade B intensity at the antenna are at the center of much consumer confusion and of the complaints leveled at Congress, the Copyright Office and the Commission. We believe that much of

[5] Even though the signal measurement procedures of section 119(a)(8) expired at the end of 1996, the Office is aware that the practice of issuing written challenges has continued in many areas of the country. Testing at individual households has also received considerable renewed interest with the federal court decisions in Florida and North Carolina affecting PrimeTime 24.

this confusion and anger can be eliminated if the Commission adopts a regulation creating the technical standards of a test to determine when a household is receiving a signal of Grade B intensity. We understand the Commission can only establish fixed guidelines for a test and cannot guarantee its legal sufficiency, since the federal courts ultimately have the authority of determining whether or not a household is unserved. We do believe, however, that if the Commission adopts a test that is technically sound, it would be highly persuasive.

As we stated earlier in these reply comments, we do not have the knowledge or expertise to suggest the technical standards of a test. We do, however, make the following general observations. First, we advocate creation of an inexpensive test. As we stated in our 1997 Report, no testing takes place if the costs are prohibitively high to satellite carriers and/or subscribers. Requiring testing over a period of days or weeks is contrary to the principle of an inexpensive test.

Second, we observe that the test should comport with the realities of subscriber receiving equipment. Specifically, we do not believe that a multidirectional, rotating antenna that allows the antenna to be pointed directly at the transmitter site of the network broadcast station fits within the definition of a "conventional outdoor rooftop receiving antenna." The test should, therefore, take into account a fixed receiving antenna that will not necessarily be pointed at the transmitter site of each network station in the vicinity of the subscriber.

Third, we recommend that in drafting a regulation the Commission take into account that in many instances subscribers, rather than satellite carriers or broadcasters, will undertake to have the test performed at their household at their own expense. While the technical parameters of such a test will be beyond the skill and understanding of most consumers, we suggest that the Commission craft a user-friendly regulation that identifies (without specifying names) those parties that are qualified to conduct such tests, and the general retail price range of such a test.

We commend the Commission for its efforts in this matter, and observe that household signal testing is one area where the Commission can do much to promote the public interest and end a great deal of the consumer confusion regarding eligibility for satellite network service.

IV. Conventional Outdoor Rooftop Receiving Antenna

Like signal intensity measurement, it is the experience of the Copyright Office that there is much confusion as to what constitutes a "conventional outdoor rooftop receiving antenna." We stated above that a multidirectional, rotating antenna is not in our opinion "conventional." We take a further step to assert that the term "rooftop" should be interpreted in a way that is specific to the building structure in which the household is located.

The Commission posits many questions regarding the specifications and location of a rooftop antenna. NPRM at paragraph 40. Most of these inquiries, such as the height of the antenna and the type and calibration of the equipment, we cannot answer. However, we urge the Commission not to adopt a standard, fixed definition of what constitutes a rooftop antenna in all circumstances. We do this out of recognition that not all subscribers reside in the same types of structures. In particular, there are circumstances where residents of multiple dwelling units ("MDUs") can and should be eligible for satellite network service where they are unable to receive a signal of Grade B intensity.

Review of the House Judiciary and Energy and Commerce Committee reports on the Satellite Home Viewer Act reveals that the drafters appeared to be principally occupied with providing subscribers in mostly rural areas of the country with access to network signals. See H.R. Rep. No. 887 (Part I), at 15 (1988)(Judiciary Committee)(The Act "will benefit rural America, where farm families are inadequately served by broadcast stations"); H.R. Rep. No. 887 (Part 2), at 19 (1988)(Energy and Commerce Committee)("The Committee believes that [the Act] will satisfy the public interest in making available network programming in the (typically rural) areas"). Given the concern with rural areas, it is not surprising to envision an antenna bolted to the chimney of a single-family, freestanding home. However, quite simply the statute does not say that this is the only type of household that can be eligible for satellite network service. Rather, it says that a subscriber who cannot receive an adequate signal at his/her particular rooftop antenna is eligible for service. An interpretation of "rooftop" that requires a rooftop to be the roof of the building, as opposed to the roof

of the household, effectively precludes many otherwise eligible subscribers from receiving satellite network service.

MDUs in particular illustrate the problems of a fixed rule. The Commission has recently determined that residents of MDUs do not have a right to locate their receiving antennas in the common areas and rooftops of MDUs which they do not own. See Second Report and Order in Docket No. 96-83 (November 20, 1998). Residents of apartment houses in rural towns across the United States will be prohibited from receiving network service under a fixed definition of rooftop antenna because they cannot erect their antennas on the roofs of their buildings.[6] It is not our experience that any member of the House Judiciary Committee drafting the section 119 legislation intended such a result.

Avoidance of this problem requires a flexible interpretation of the meaning of the term "rooftop" that is building-specific. In the case of single family homes, the physical roof of the structure would appear to be the appropriate, and intended, location of the antenna.[7] For MDUs, we believe that "rooftop" should be interpreted in a fashion relative to the height or ceiling of the dwelling unit, and not the rooftop of the entire structure. In this context, signal measurements would be made at an antenna located outdoors (such as a balcony or patio) from the dwelling. Once again, we do not make any recommendations as to the height or specifications of the antenna.

V. Local-into-Local Retransmissions

The Commission requests comment on the prospect that the satellite industry will develop local-into-local technology to serve every community. Our position, as advocated in our 1997 Report, is that local-into-local retransmission of network signals is the solution to the difficulties surrounding the "unserved household" restriction. See 1997 Report at 119-121. We are actively working with

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[6] For those such apartment dwellers who do not have access to cable television, as is often the case in small towns, they are forever prohibited from receiving any network service.

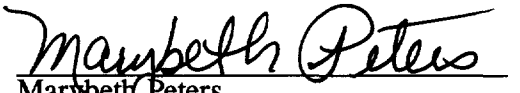
[7] In saying this, we recognize that there are certain single family households which, for insurance purposes, cannot practically have rooftop antennas. Typically, these are homes located in areas of the country where the risk of lightning strikes is high. Unfortunately, we cannot find any statutory support for accommodating these exceptions.

Congress toward a legislative solution that expressly recognizes the permissibility of local-into-local retransmissions under the copyright laws, and provides incentive for their implementation. We are hopeful that Congress will enact such legislation next year as the Satellite Home Viewer Act nears expiration.

VI. Conclusion

Once again, we commend the Commission for opening this rulemaking proceeding and tackling the difficult issue of unserved households. We recognize that the Commission is limited in the actions that it can take. If the Commission does choose to follow some or all of the recommendations made in these reply comments, we believe that such action would go a long way in making the satellite compulsory license more workable and efficient.

Respectfully submitted,



Marybeth Peters
Register of Copyrights

Dated: December 21, 1998